SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 807

CITY OF WEST ALLIS, VILLAGE OF WEST MILWAUKEE, and CITY OF SOUTH MILWAUKEE, all municipal corporations; ARNOLD H. KLENTZ, PHIL ELLIOTT, ERNEST J. TERRIEN, JOSEPH TABUSHING, CHESTER W. GROBSCHMIDT, and LOUIS A. LANGE,

Petitioners,

vs.

COUNTY OF MILWAUKEE, in the State of Wisconsin,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

COMPLAINT

This action involves the sufficiency under the Wisconsin law of the following complaint:

> Plaintiffs, City of West Allis, Arnold H. Klentz, and Phil Elliott, by William T. Schmid, their attorney; Village of West Milwaukee, Ernest J. Ter-

rien, and Joseph Tabushing, by Quarles, Herriott, Clemons, Teschner & Noelke, their attorneys; City of Wauwatosa, Roger P. Paulsen, and Frederick C. Kuphall, by Milton F. Burmaster, their attorney; and City of South Milwaukee, Chester W. Grobschmidt, and Louis A. Lange, by Francis W. Cathlina, their attorney, as and for a complaint, show to the Court as follows:

1. This action is for declaratory judgment seeking a declaration of certain rights, status and other legal relations of the parties, all pursuant to Section 269.56, Wis. Stats.

FIRST CAUSE OF ACTION

2. Plaintiff City of West Allis ("West Allis") is a city of the Second Class, located in the County of Milwaukee, State of Wisconsin, and has its principal offices at 7525 West Greenfield Avenue, in West Allis; plaintiff Arnold H. Klentz resides at 8706 West Grant Street, in West Allis, and is a property owner and taxpayer of West Allis and Milwaukee County and is the Mayor of West Allis; plaintiff Phil Elliott resides at 1539 South 76th Street, in West Allis, and is a property owner and taxpayer of West Allis and Milwaukee County and is the City Clerk of West Allis.

3. Plaintiff Village of West Milwaukee ("West Milwaukee") is a municipal corporation, located in the County of Milwaukee, State of Wisconsin, and has its principal offices at 4755 West Beloit Road; plaintiff Ernest J. Terrien resides at 1519 South 53rd Street, in West Milwaukee, and is a property owner and taxpayer of West Milwaukee and Milwaukee County and is the President of West Milwaukee; and plaintiff Joseph Tabushing resides at 1260 South 50th Street, in West Milwaukee, and is a property owner and taxpayer of West Milwaukee and Milwaukee County and is the Village Clerk of West Milwaukee.

4. Plaintiff City of Wauwatosa ("Wauwatosa") is a city of the Second Class, located in the County of Milwaukee, State of Wisconsin, and has its principal offices at 7725 West North Avenue, in Wauwatosa; plaintiffs Roger P. Paulsen and Frederick C. Kuphall reside at 2536 North 83rd Street and 2013 Ludington Avenue, respectively, in Wauwatosa; and each of said individual plaintiffs is a property owner and taxpayer of Wauwatosa and Milwaukee County.

5. Plaintiff City of South Milwaukee ("South Milwaukee") is a city of the Fourth Class, located in the County of Milwaukee, State of Wisconsin, and has its principal offices at 2005 — 10th Avenue, in South Milwaukee; plaintiff Chester W. Grobschmidt resides at 910 — 17th Avenue, in South Milwaukee, and is a property owner and taxpayer of South Milwaukee and Milwaukee County and is the Mayor of South Milwaukee; and plaintiff Louis A. Lange resides at 418 Hawthorne Avenue, in South Milwaukee, and is a property owner and taxpayer of South Milwaukee and Milwaukee County.

6. The County of Milwaukee ("the County") is a body corporate, organized and existing pursuant to the provisions of Chapter 59 of the Wisconsin Statutes, and has its principal offices at Milwaukee County Courthouse, 901 North 9th Street, in the City of Milwaukee, State of Wisconsin.

7. West Allis, West Milwaukee, Wauwatosa, and South Milwaukee bring this action on their own behalf and on behalf of all other municipalities in Milwaukee County so situated; and the individual plaintiff property owners and taxpayers of Milwaukee County bring this action on their own behalf and on behalf of all property owners and taxpayers of Milwaukee County.

8. West Allis, Wauwatosa, and South Milwaukee each have heretofore expended substantial sums of

money and incurred municipal obligations for the construction of incinerator-plant facilities and the acquisition of waste-disposal dump sites for the purpose of disposing of incinerator residue and other noncombustible waste in order to serve the residents of their respective municipalities and have heretofore undertaken such service and continue to provide the same as of the date of this Complaint. Pursuant to agreement authorized by statute, West Allis provides incinerator services, including the disposal of incinerator residue for West Milwaukee; and West Milwaukee has expended monies for the purchase of, and owns, operates, and maintains, a dump site for disposal of noncombustible waste collected from its residents. Each of said municipalities has levied and collected taxes on all the taxable property within their respective boundaries for the purpose of paying for their own incinerator and/or waste disposal facilities or the obligations incurred to finance the same and interest thereon.

9. On information and belief, for many years prior to commencement of this action, all other municipalities in Milwaukee County have either constructed, or otherwise acquired, incinerator facilities and waste-disposal dump sites or have contracted for the same at muncipal expense.

10. The construction, acquisition, operation and maintenance of incinerator plants and waste-disposal dump sites and the municipal contracting for such services is a local affair within the meaning of Article XI, Section 3, of the Wisconsin Constitution, concerning which cities and villages are empowered to make and have made determinations.

11. Upon information and belief, in the year 1965 the County contracted with consulting engineers for the accomplishment of a study for construction of a county-wide incinerator and refuse disposal system; and in the month of July, 1965, a report there-

on was rendered to the County by said consulting engineers. Said study, *inter alia,* proposed a plan for incinerator-plant construction by the County to service all, or substantially all, of the territory of the County, including the plaintiff municipalities and all other municipalities in the County which have already acquired such facilities or contracted for incinerator and waste-disposal services.

12. On February 28, 1967, the County Board purportedly adopted an initial resolution providing for the borrowing of $5,500,000 for the purpose of paying the cost of constructing new incinerator facilities, including the acquisition of land, said borrowing to be accomplished by the issuance of general obligation bonds of the County. Said proposed bond issue was intended to provide the financing for the instigation of the county-wide refuse disposal system which had been reported upon by the consulting engineers, referred to in paragraph 11 hereof, and, on information and belief, was premised upon the purported authority conferred by Sections 59.07 (52) (b) and 67.04(1) (w), Wis. Stats.

13. On March 21, 1967, the County Board of the County adopted a resolution directing noticing of sale of the aforesaid general obligation bond issue, said sale to be accomplished on or about May 2, 1967. In the event said bonds are sold, the County will levy a direct, annual, irrepealable tax for the purpose of paying principal and interest on said bonds, which tax will be on all the taxable property in Milwaukee County, including all property within the municipalities located therein, and the property owned by the individual plaintiffs and all other property similarly situated; and the County thereafter will maintain the right to collect from the municipalities in Milwaukee County and/or the taxable properties within said municipalities a proportionate amount of the total tax levied, all to the

damage of plaintiffs and others on whose behalf this action has been commenced.

14. Upon information and belief, the County has incurred, and continues to incur, expenses as a consequence of the intended construction of incinerator facilities and general obligation bond financing therefor, all to the damage of county taxpayers, including plaintiffs herein.

15. The County is without authority to engage in such incinerator construction, site acquisition, and other waste-disposal activities and to finance the same by the issuance of general obligation bonds payable from *ad valorem* taxes levied on all the taxable property in the County.

AS AND FOR A SECOND CAUSE OF ACTION, plaintiffs allege as follows:

16. Incorporate herein by reference the allegations of paragraphs 2 through 14 of the first cause of action as if the same were fully set forth herein.

17. By virtue of the construction of incinerator facilities and the acquisition of waste-disposal dump sites by West Allis, Wauwatosa, South Milwaukee, and other municipalities in Milwaukee County and the contracting for incinerator services and acquisition of waste-disposal dump sites by West Milwaukee and the remaining Milwaukee County municipalities which do not own incinerator facilities, the authority to finance construction and acquire such facilities has been pre-empted and the County is without authority to proceed with its program of incinerator construction and waste disposal on a county-wide or any other basis or to finance the same by the issuance of bonds as alleged in paragraph 12 hereof.

AS AND FOR A THIRD CAUSE OF ACTION, plaintiffs allege as follows:

18. Incorporate herein by reference the allegations of paragraphs 2 through 14 of the first cause

of action as if the same were fully set forth herein.

19. The purpose of the proposed general obligation bond financing is not a public purpose of the County, by virtue of the fact that none of the plaintiff municipal corporations or taxable property situated therein will derive any benefit from the issuance of said bonds or the construction of facilities for which the bonds are issued; nor will any benefit be derived by other municipalities which have their own facilities or have contracted therefor.

AS AND FOR A FOURTH CAUSE OF ACTION, plaintiffs allege as follows:

20. Incorporate herein by reference the allegations for paragraphs 2 through 14 of the first cause of action as if the same were fully set forth herein.

21. The meeting at which the County Board purportedly adopted the initial resolution authorizing the issuance of $5,500,000 bonds was not an annual or adjourned annual or a special meeting of the County Board as required by Section 67.05(3), Wis. Stats., and hence the adoption of said initial resolution was null and void.

WHEREFORE, plaintiffs demand judgment, declaring that:

1. The County of Milwaukee is without authority to proceed to sell and issue the proposed $5,500,000 general obligation bonds for the purpose of paying the cost of constructing new incinerator facilities, including the acquisition of land.

2. The County of Milwaukee is without authority to construct and finance incinerator facilities and waste-disposal dump sites on a county-wide basis and to levy taxes therefor against all the taxable property in said County.

3. Section 59.07(52)(b) and 67.04(1)(w), Wis. Stats., are unconstitutional.

4. The purported adoption of an initial resolution by the County of Milwaukee on February 28, 1967, wherein the County authorized the issuance of $5,500,000 general obligation bonds for the purpose of paying the cost of constructing new incinerator facilities, including the acquisition of land, is null and void for the reason that said initial resolution was not adopted at an annual or adjourned annual or a special meeting of the County Board as required by Section 67.05(3), Wis. Stats.; and the County is without power to further pursue the sale and/or issuance of the bonds purportedly authorized under said initial resolution.

WISCONSIN LAWS

The Wisconsin laws authorizing Milwaukee County to engage in the operation of a waste disposal system and finance the construction of such a system by the issuing of bonds read as follows:

> 59.07 General powers of board. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language: * * *
>
> (52) MILWAUKEE COUNTY; SEWAGE, WASTE, REFUSE. In any county having a population of 500,000 or more: * * *
>
> (b) Engage in the function of the destruction or disposal of waste by providing dumpage facilities; acquire lands by purchase, lease, donation or right of eminent domain within such county and use the lands as dumpage sites for depositing, salvaging, processing, burning or otherwise disposing of the waste, and acquire land by purchase, lease or donation outside such county for said purposes where state and local regulations permit; construct and equip incinerators and other structures to be used for dis-

posal of waste; maintain, control and operate dumpage sites; maintain, control and operate incinerators for burning such materials; utilize or dispose of by sale or otherwise heat or power reclaimed from incinerator facilities; sell all salvageable waste materials and by-products; levy a tax to create a working capital fund to maintain and operate dumpage facilities, construct, equip and operate incinerators and other structures for disposal of wastes; charge or assess reasonable fees to persons making use of such sites, incinerators or other structures for the disposal of waste; make charges approximately commensurate with the cost of services rendered to any municipality using the county waste disposal facilities; authorize payment to any municipality, in which county waste disposal facilities, including incinerators, are located, to cover the reasonable cost of fire fighting services rendered to such county when the occasion demands such service; contract with private collectors and municipalities and transporters to receive and dispose of waste other than garbage at dumpage and incinerator sites; levy taxes to provide funds to acquire sites and to construct and equip incinerators and other structures for disposal of wastes; adopt and enforce ordinances, rules and regulations necessary for the orderly conduct of providing such dumpage facilities and services and provide forfeitures for the violation thereof. The charges for waste disposal services shall be determined by the board and shall include a reasonable charge for depreciation. In the determination of the charges the board shall give full consideration to any fees directly collected for the service. Waste disposal charges shall be apportioned pursuant to s. 70.63 to the respective municipalities receiving the service. The depreciation charges shall create a reserve for future

capital outlays for waste disposal facilities. Before acquiring in such county any site to be used for dumping or the erection of an incinerator or other structure for the disposal of waste, a public hearing shall be held in the county following notice of hearing by publication as a class 3 notice, under ch. 985. The term "waste" as used in this paragraph includes, without restriction because of enumeration, garbage, ashes, municipal, domestic, industrial and commercial rubbish, waste or refuse material. The powers conferred by this paragraph are declared to be necessary to the preservation of the public health, welfare and convenience of the county.

67.04 Purposes and specific limitations of bond issues. Municipalities are empowered to borrow money, subject to the general limitation of amounts prescribed by section 67.03, and subject in some specific cases to the further limitations prescribed by this section, and to issue bonds therefor, for the purposes enumerated in this section. Such bonds may be issued:

(1) By any county: * * *

(w) In counties having a population of 500,000 or more, to acquire lands and improve the same by providing facilities including the construction of incinerators for the disposal of waste as defined in s. 59.07 (52) (b).

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE XI, Section 3, Wisconsin Constitution. "Municipal home rule; debt limit; tax to pay debt. Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as shall with uniformity affect every

city or every village. The method of such determination shall be prescribed by the legislature. * * *"

ARTICLE IV, Section 23, Wisconsin Constitution. "The legislature shall establish but one system of town and county government which shall be as nearly uniform as practicable."

ARGUMENT

I.

NO FEDERAL QUESTION INVOLVED AS TO PETITIONERS CITY OF WEST ALLIS, VILLAGE OF WEST MILWAUKEE AND CITY OF SOUTH MILWAUKEE

The plaintiffs in the action below sought a judgment declaring Wisconsin Statutes, s. 59.07(52)(b) and 67.04 (1)(w) authorizing Milwaukee County to construct and operate waste disposal systems and levy taxes for such purposes, violate the provisions of the Wisconsin Constitution. Since a municipal corporation created by the State has no protection or immunity under the Federal Constitution, which it may invoke in opposition to the will of its creator, there is a want of a substantial federal question. *City of Los Angeles and Ray L. Chesebro v. Los Angeles County Flood Control District* (1938), 305 U.S. 564, 83 L. ed. 356; *Pawhuska v. Pawhuska Oil & Gas Co.* (1918), 250 U. S. 394, 63 L. ed. 1054; *Trenton v. New Jersey* (1922), 262 U.S. 182, 67 L. ed. 937; *Williams v. Baltimore,* 289 U.S. 36, 40, 77 L. ed. 1015; *South Bend v. De Haven,* 302 U.S. 644, 82 L. ed. 500.

II.

SECOND REASON ADVANCED BY PETITIONER FOR GRANTING WRIT OF CERTIORARI RELATES TO A CAUSE OF ACTION NOT EVEN ALLEGED IN THE COMPLAINT

A careful reading of the complaint will disclose no reference to Article IV, Section 23, of the Wisconsin Constitution. Further, there is no allegation that the classification of counties by the legislature on the basis of population is improper, nor are any facts alleged which would support a finding that the classification is arbitrary or unreasonable.

We fail to see how the petitioners can complain of a finding by the Wisconsin Supreme Court that the classification by the legislature was reasonable when no allegation to the contrary was made in the complaint. The burden rests upon the petitioners to allege or set out facts which would establish that the action of the legislature was improper, but this they failed to do, as the Wisconsin Supreme Court said:

> 39 Wis. 2d 373. "The appellants contend that the court should order a fact finding to determine whether or not conditions in Milwaukee county make it necessary to have an additional waste-disposal facility. They conclude that, if the additional facility is unnecessary, the special treatment accorded to counties of over 500,000 violates the county uniformity clause. This finding, however, has already been made by the legislature. It has determined that it is necessary and has merely left to the county the option of when to exercise the powers that the legislature considers to be imperative. Since the county board has proceeded to implement the authority given to it by the legislature, no fact-finding function remains to the court unless there appears a patent unreasonableness. Such unreasonableness does not appear."

III.

THIS COURT HAS ALREADY DECIDED THE QUESTION OF DUE PROCESS ADVERSELY TO PETITIONERS

Petitioners complain that the acceptance by the Wisconsin court of the legislative finding that the County waste disposal system in Milwaukee County was "necessary to the preservation of the public health, welfare and convenience of the County" without giving them an opportunity to attack this finding by contradictory evidence was a denial of due process. We submit that this question has already been decided by this court in *Chesebro v. Los Angeles County Flood Control District* (1939), 306 U.S. 459, 83 L. ed. 921. This case involved a California statute creating a flood control district and authorizing the levy of taxes to pay the cost of local improvements and their maintenance. An action was brought by a taxpayer whose property had been included in the district, alleging that the levy of assessments under the statute against his property were invalid because the improvements would be of no benefit to his property. A demurrer to the complaint was sustained on the ground a finding by the legislature that the lands within the flood control district would be benefited is conclusive unless shown to be without reasonable foundation. On appeal this court affirmed. Quoting from the opinion:

> 306 U.S. 463. "In the absence of flagrant abuse or purely arbitrary action, the State, consistently with the federal Constitution, may establish local districts to include real property that it finds will be specially benefited by drainage, flood control, or other improvements therein, and, to acquire, construct, maintain and operate the same, may impose special tax burdens upon the lands benefited. * * * And where, within the scope of its power, the legislature itself

has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive."

CONCLUSION

The petitioners in their complaint attempt to establish the invalidity of a Wisconsin statute. A demurrer to the sufficiency of the complaint was sustained by both the trial and appellate courts. In a well-considered opinion, the Wisconsin Supreme Court concluded that in the absence of allegations of fraud or such arbitrary or unreasonable action as to constitute an abuse of discretion, the question of the need or necessity of a county-wide waste disposal system was one for the legislative branch of the government to determine, and the court would not interfere with its decision. This conclusion is in accord with the decisions of this court, and we submit the petition for a writ of certiorari should be denied.

Respectfully submitted,

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